BRIEF TO THE JUDICIAL INQUIRY INTO THE CONDUCT OF TERRITORIAL COURT JUDGE R.M. BOURASSA

Introduction

The NWT Status of Women Council would like to focus our submissions to the Judicial Inquiry on our concerns with respect to the apprehension of bias raised explicitly in the context of Judge Bourassa's comments as quoted in an article in the Edmonton Journal on 20 December 1989.

We submit that the comments made by Judge Bourassa give rise to an apprehension of bias with respect to gender and/or culture, and that this should be explicitly addressed by the Inquiry in its final deliberations and report.

Apprehension of Bias

We submit that the making of remarks which a reasonable and well-informed person would perceive as biased constitutes serious misbehavior on the part of a member of the judiciary. As indicated by several individuals at a meeting of Mr. Ballantyne with a large group of people on 21 December, 1989, some women may be less likely to lay complaints of sexual assault if they perceive that a judge has preconceptions concerning the seriousness and degree of violence associated with sexual assault in the north. If such a "chilling" effect is created as a result of comments made by judicial officials, this will seriously affect the way in which victims view the judicial system and its capacity to protect them.

Women, both aboriginal and non-aboriginal, Northern or Southern, have a right to be treated equally by the justice system and must be received in a judicial climate which is, as much as possible, neutral, fair, and sensitive to their position as women, especially in relation to crimes of sexual violence such as sexual assault or rape. As Mr. Justice Tallis suggested in

R.v. Ikalowjuak:

> I have already mentioned that rape is in the eyes of our law a serious offence. This means that women of all ages and regardless of where they live, whether it be in Pangnirtung, Frobisher Bay, Yellowknife, Montreal, or any other place in Canada, are entitled to the protection that the law accords, and I would not want to leave the impression that the courts do not consider rape to be a serious offence; they do; and society considers it a serious offence because Parliament has said so.[1]

While there has been much concern about the leniency for sentences for those convicted of sexual assault in the NWT, and a desire that similar principles of sentencing apply throughout Canada, it is fundamentally important for members of the judiciary to view sexual assault as the violent, serious offence that it is. The public impression should not be left that sexual assault is not a serious offence for residents of the Northwest Territories. Such an impression reflects a bias which is arguably gender-biased and culturally-biased. Judge Bourassa's comments raise the spectrum of genderal and cultural biases in that women, particularly Northern women are not viewed as being "victims" of sexual assault in the same sense that Southerners, or perhaps non-aboriginal women are viewed. The effect this behavior has on women vis-a-vis an apprehension of bias is troubling to us as an organization. We are not alone in our reaction to this type of incident.

For example, in 1984 the New York State Commission on Judicial Conduct investigated remarks, similar in some ways to those in question here, made by Mr. Justice Fromer to a reporter concerning a particular rape case that was before him. The Commission found that

> ... such comments have the effect of discouraging complaints of rape and sexual harassment. The impact upon those who look to the judiciary for protection from sexual assault may be devastating. [2]

It is critically important that women of the NWT be able to look to the judiciary for protection against sexually violent offenses, prohibited by

the Canadian Criminal Code. Nothing should reflect a bias against women, nor should there be any obstacles, either procedural or attitudinal, in the path of protection for women.

A recent Judicial Inquiry elsewhere in Canada, the 1986 Nova Scotia Judicial Council investigation into the conduct of Judge R. A. Bartlett, has also raised the issue of "a distinct bias in favour of males over females, thus giving the impression of unfairness".[3] This inquiry involved the conduct of Family Court Judge R.A. Bartlett, a born-again Christian who used the Bible as the basis for telling women in his court to submit to their husbands.The Inquiry found that:

> The pattern and practice followed by Judge Bartlett during the course of his judicial proceedings lead to uncertainty and confusion in the minds of many females who appear before him. Often these are women whose lives and the lives of their children have been fraught with turmoil and grief. They must perceive that the judicial process, as their last resort, is being applied with a fair and even hand. The process Judge Bartlett follows in reaching his conclusions in law gives them no such perception.[4]

Greater sensitivity must be shown by members of the judiciary to the position of female victims. Women must not be dissuaded from requesting assistance when a victim of a violent crime, be it sexual or otherwise. Moreover, stereotypic or over-generalizing characterizations of women's behavior or experience as victims should be avoided to uphold the respect for all persons which is required by the justice system. Women must be able to see the fair and evenhanded administration of justice.

Insensitivity to Women's Concerns

Inquiry Counsel has presented background evidence and documentation on the "social context" within which Judge Bourassa's comments were made. This evidence documents the broad concerns of the NWT government and non-government agencies surrounding violence against women and children, as evidenced in initiatives to combat wife abuse, sexual assault, and child sexual abuse which have been undertaken. These concerns were primarily raised by women and their organizations who continue to keep

these issues in the public eye and lobby for government and community action to address them. Much of the "social context" documentation therefore represents the perspective and views of women. We urge this Inquiry to evaluate Judge Bourassa's comments from the perspective of women, especially agoriginal women.

We submit that a finding that Judge Bourassa's remarks demonstrate an insensitivity to or lack of awareness of the "social context" of the N.W.T. is also a finding that the remarks demonstrate an insensitivity to or lack of awareness of women's perspective and situation. As with the raising of an apprehension of bias, the making of remarks which are insensitive to women's concerns will again affect the confidence which female victims of violence have in the legal system and the likelihood that they will turn to the legal system for help.

Legal Test for Apprehension of Bias

C. Boyle and S. Worth Rowley have suggested that there appear to be three types of bias in law: biases respecting pecuniary interest, favoritism, and the perception that a judge has predetermined an issue. This third type of bias is arguably relevant here:

> A third type of bias involves the possibility that the judge has predetermined the issue before the court, and includes what is referred to as "attitudinal bias". Expressions of strong views on an issue or other evidence might point to a possibility that such a "predetermination" or "attitudinal" bias existed, and that the issue may have been prejudged.
>
> The legal test does not require an inquiry into whether the decision maker is actually biased. The judge is presumed to be able to put aside personal feelings and attitudes and adjudicate impartially. Rather, the test is whether the particular facts give rise to a "reasonable apprehension of bias". The concern is that "justice not only be done, but should manifestly and undoubtedly be seen to be done".....[5]

C. Boyle and S. Worth-Rowley note that various tests for a "reasonable

apprehension of bias" have been formulated. The test which they suggest is compelling is that which the Supreme Court of Canada has developed in the following way:

> ...the apprehension of bias must be a reasonable one, held by reasonable and rightminded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude."[6]

We believe that the comments attributed to Judge Bourassa in the Edmonton Journal article of 20 December 1989, should be subjected to this legal test for apprehension of bias in order for the Inquiry to arrive at an assessment of possible misbehavior and/or a finding that Judge Bourassa is unable to perform his duties.

What Types of Bias Are In Issue Here?

The remarks of Judge R.M. Bourassa should be considered for two types of bias: first, the apprehension of gender bias; second for an apprehension of cultural bias. The latter is important in that they refer to sexual assaults on women "in the North" as being different from those elsewhere. Therefore the question to be asked is "would a reasonable and well-informed person conclude that the comments give rise to an apprehension of bias prejudicial to the interests and concerns of Northern females seeking justice in sexual assault cases?" This question needs to be explored in light of both the matter of gender bias and cultural bias.

(i) Apprehension of Gender Bias

A growing sensitivity toward gender bias in the law, legal institutions, and the personnel who administer justice is reflected in recent efforts in scholarship in Canada and particular initiatives in the United States. For example, a great deal of work has been done in the United States on gender bias in the judicial system, where twenty-seven states have established task forces to examine gender bias in their courts. [7]

A similar awareness is growing in Canada. One may recall the recent speech given by Madam Justice Bertha Wilson in February, 1990, in which she suggested that:

> In some other areas of the law, however, I think that distinctly male perspective is clearly discernable and has resulted in legal principles that are not fundamentally sound and should be revisited as and when the opportunity presents itself...Some aspects of the criminal law in particular cry out for change since they are based on presuppositions about the nature of women and women's sexuality that in this day and age are little short of ludicrous. [8]

Madam Justice Wilson calls for greater sensitivity toward gender bias and an elimination of it in the legal system.

Possible gender bias with respect to sexual assault cases has been studied in Canada and a number of specific problems have been noted by researchers. A sampling of these problems would include the following:

<u>Discrepancy between the judge's understanding of sexual assault and the lived experience of the victim.</u>

The Metro Action Committee on Public Violence Against Women and Children (METRAC) has done extensive research on sexual assault sentencing using its data base of over 500 cases (see Appendix 2). They found:

> ..that judges' understanding of the experience of sexual assault, as evidenced by their comments to sentencing, only infrequently coincides with the reality reported by sexual assault survivors. [9]

The same finding has also been noted in a study by the Vancouver Association of Women and the Law. [10]

This discrepancy is particularly noted with respect to acquaintance rape. Studies have shown that women are most traumatized by being assaulted by a casual acquaintance, yet these offenders are sometimes treated more leniently in the courts. [11]

Judges often underestimate the impact on the victim.

The METRAC work also suggested that:

> Judges often profoundly underestimate the impact of this assault. Formal research, as well as our own experience in talking to sexual assault survivors, have confirmed that the psychological consequences are usually severe and long-lasting. [12]

A recent paper has also cautioned that:

> While the problem of lack of evidence on this issue (impact on victim) may in part be addressed by the increasing use of Victim Impact Statements, expert evidence concerning the nature of post-sexual abuse and post-rape trauma is clearly necessary to challenge the notion that sexual offenses do not give rise to lasting harm. [13]

A perception that sexual assault is passive does not adequately reflect the very active, physical character of the offence and the ongoing trauma the victim experiences.

Marital stress/intoxication as mitigating factors

The METRAC study also concluded that:

> The naming of marital dysfunction as a source of "duress" is a particularly objectionable form of woman-blaming. [14]

Placing the blame on the victim because of a dysfunctional marriage, alcohol or drug abuse is another form of further victimization. The perspective that sexual assault arises because a woman is drunk clearly transfers the responsibility for the act to the woman-victim from the offender. This is particularly insensitive to women's concerns.

METRAC has analyzed the use of alcohol as a mitigating or aggravating factor using their data base of over 500 sexual assault cases:

> We have noticed, in analyzing the cases, that alcohol consumption by the offender is more likely to be seen as a mitigating than an aggravating factor; alcohol consumption by the victim is also more likely to be treated as a mitigating factor...The central issue is responsibility. As long as the assumption persists (however subtly) that sexual assault victims are somehow responsible for being victimized, being intoxicated will be perceived as "asking for it". But to the extent that intoxication makes the victim less able to assess people and situations and to take evasive or defensive action when threatened, she is in the same position as any other person whose permanent or temporary state makes her/him "easy pickings" for wrongdoers. To pick on those who are less able to take care of themselves should make the offender more blameworthy, not less so. [15]

Perception of Violence

The METRAC study suggested that:

> The absence of overt physical force or weapons is often seen to imply lack of coercion" which "In the majority of sexual assaults, the assailant uses verbal threats, a position of authority, or the fear evoked by his size and strength to establish power over the victim. [16]

Sexual assault is a violent offence because it is perpetrated against a woman without her consent. An attitude toward sexual assault which is not cognizant of its violent character is an attitude which neglects the fact that it is an "assault" for the woman, and for the purposes of Canadian criminal law.

Choice of Terminology

Another study cautioned against the use of deceptive language:

> One expression which occurred frequently in relation to sexual offenses, particularly those against children, was "fondling"...Even in

> those offenses against children which do not involve direct force, the term "fondling" fails to encompass the exploitative nature of the acts; rather it suggests that the assailants were giving affection rather than taking gratification from the touching. [17]

The judiciary must be conscientious in not miscasting sexual offences as affection or kindness instead of abusive, exploitative acts.

We would suggest that the comments attributed to Judge M. Bourassa in the Edmonton Journal article of 20 December, 1989, be considered as giving rise to an apprehension of gender bias in the following respects:

- His use of sexist language in referring to a potential rape victim as "a pair of hips". His use of crude and offensive terminology may appear to belittle the trauma and impact of the offence on the victim and denote a lack of sensitivity to a woman victim's perspective and experience.

- His broad generalization that Northern rape victims are usually drunk and passed out has not been substantiated by preliminary RCMP statistics presented to the Inquiry. The use of broad (particularly unfounded) generalizations about women victims may give rise to a reasonable apprehension of gender bias. This comment may also give rise to the apprehension that the person making the comment believes that the impact on the victim is reduced if she is "drunk and passed out" .

- The generalization that there is less violence in Northern rapes is also cause for concern. If there is a preconception abut the nature of rape in the North, would a reasonable person also fear that a different standard of justice could be applied, resulting in bias or disadvantage to the victim?

- His use of the work "cuddle" to refer to Angottitauruq's behavior towards the victim. Like the term "fondle" (p.8), "cuddle" is a euphemism used to describe behavior associated with sexual assault, which is viewed as insensitive to women. In effect, the euphemism denies the exploitative nature of the act and ignores the impact on the victim. We recognize that this term was used by the psychologist in this case, but its ready acceptance and use by the judge in the published comments might well

give rise to an apprehension of bias.

The simplistic model of familial child sexual abuse referred to by Judge Bourassa in his testimony does not appear to acknowledge the offender's responsibility for his actions: he is simply blocked, so he turns to the child to meet his needs emotionally and physically. One well-known writer in the field of child sexual abuse, David Finkelhor, discusses the problem of responsibility in the following way:

> One of the most persistent criticisms of explanations of sexual abuse is that they tend to take responsibility for the abuse off the offenders and displace it onto either victims, third parties, or society as a whole...The four pre-conditions model of sexual abuse puts the issue of responsibility into a somewhat better perspective. In this model the problem of a mother's failing to protect her child or a child's failing to resist victimization are taken seriously as contributing elements. However, it is clear that these factors are not germane to the situation until after the potential offender has already taken some giant strides on the road toward committing the offense. The matter of victim's and mother's behavior are relevant only because the offender is already embarked on an antisocial train of events, better showing where responsibility lies. [18]

(ii) Apprehension of Cultural Bias

The second area of bias, or apprehension of bias, raised by Judge Bourassa's comments is that of "cultural" bias. By cultural bias we mean a display of opinion regarding another culture which is stereotypic and insensitive to the cultural attributes of the people involved. In this instance, we submit that Judge Bourassa's comments are particularly directed at aboriginal women as aboriginal people make up the majority of the population of the Northwest Territories. Hence, his comments about behavior patterns in the North are aimed at how he perceives aboriginal people behave.

Interesting work has been done on the use of cultural considerations in judicial sentencing in sexual assault cases. T.A. Nahanee has found evidence that the use of cultural considerations as a mitigating factor in

NWT sexual assault cases involving Inuit may have resulted in lenient sentencing as measured against the standard in R. v. Sandercock.[19] She argues that this may infringe upon the rights of Inuit women for equal protection of the law, as provided for in Section 15 of the Canadian Charter of Rights and Freedoms. In other words, reference to cultural considerations may be prejudicial to the delivery of justice to a particular culturally-defined group of female victims.

In commenting that rape in the North is different from rape "down South", Judge Bourassa is making a distinction based on culture, i.e. what happens in Northern society versus what happens in Southern society (or Kingston society, depending which set of comments one examines). Judge's appreciation of "cultural factors" may be erroneous.

Judge Bourassa's comments arguably make two generalizations about aboriginal society in the North, as opposed to Southern society. First, that the majority of sexual assaults in Northern communities involve a woman victim who is drunk and passed out, and a man who "comes along, sees a pair of hips and helps himself". Therefore, that women drink more in the North and are willing victims. Second, that in most rapes in Southern society there is violence apart from the rape itself, whereas in Northern society there are many cases where the woman is drunk and the man is drunk and the act is merely a passive one. We believe this raises an apprehension of cultural bias. His inference is not accurate and is harmful to women victims.

There is a growing sensitivity to the problem of cultural or racial biases in the administration of justice.[20] A recent article by Professor Turpel, a Cree law professor, has suggested that judges be careful in forming broad-sweeping opinions about aboriginal peoples and that judges examine their own value-systems to eliminate as much as possible racial or cultural biases: "If choices are personal (and therefore cultural); can the judge weigh a value system which is culturally different? Can a judge know a value which is part of an aboriginal culture and not her own?"[21] It is important that judges examine their values to ensure that they are not perpetrating stereotypic and racially-offensive attitudes in their high-profile capacities.

The forming and expression of a generalization about aboriginal peoples such as that rape is not a serious offence for them, or not a violent offence, or that they are too drunk to know better, is an expression of a bias which is unfounded and indeed harmful. It is even racially prejudiced.

The 1990 Report of the Royal Commission on the Donald Marshall, Jr., Prosecution included several findings and recommendations which are arguably relevant in this context. The Royal Commission found that racist attitudes in the system for the administration of justice resulted in Donald Marshall Jr. not being afforded the treatment he should have been. Moreover, they found that a two-tier system of justice was in place in the province of Nova Scotia in that two standards of administration of justice and respect (or lack thereof) for accused were operative.

This latter finding is relevant for this Inquiry: Do Judge Bourassa's comments suggest there is a two-tier system in place for sexual assault in the North (despite the Criminal Code) - namely one for Southern women and one for Northern (aboriginal) women? This nagging question is of grave concern to the NWT Status of Women Council and hopefully this Inquiry can resolve it.

There should be one standard, reflecting a serious and grave concern for sexual assault cases. We endorse the finding in the recent Report of the Royal Commission that:

> In our view, Native Canadians have a right to a justice system that they respect and which has respect for them, and which dispenses justice in a manner consistent with and sensitive to their history, culture and language.[22]

This would include the right to a judiciary which respects aboriginal people, including aboriginal women, and which is sensitive to their position when victims of sexual assault. We call into question whether the inferences drawn from Judge Bourassa's comments reflect a position of respect on his part.

The Royal Commission into the prosecution of Donald Marshall, Jr.,made numerous recommendations to improve the administration of justice for

aboriginal peoples and blacks in Nova Scotia (and Canada). Two should be borne in mind here as the Status of Women Council believes they are important for a movement away from the apprehension of cultural bias in the NWT:

33. Responsibility of Chief Judges

> We recommend that the Chief Justices and the Chief Judges of each court in Nova Scotia exercise leadership within his or her area of responsibility to ensure fair treatment of visible minorities in the criminal justice system.

29. Native Justice Committees

> We recommend that the advice of leaders chosen by the Native community and sitting as a Native Justice Committee be sought by judges in sentencing Natives, where possible. [23]

The Royal Commission's findings should be viewed as providing benchmarks for the standards of conduct for the judiciary. Judges must exercise responsibility, leadership and sensitivity when the interests of aboriginal people are evaluated. Has Judge Bourassa shown this kind of responsibility, sensitivity and care? His example is, in the context of this Inquiry, a negative one in terms of the thrust of the Royal Commission's recommendations, and one which will, hopefully, be criticized and duly corrected.

Conclusion

We submit that Judge Bourassa's comments, as quoted in the article of 20 December1989, can be seen as raising an apprehension of gender and/or cultural bias using the objective legal test of the "reasonable and well-informed person" evaluating his comments.

We encourage this Inquiry to seriously consider the effect of his comments, and to consider how confidence can be restored in the judiciary in the NWT so that women, and particularly aboriginal women, can be treated with sensitivity and respect, especially when traumatized by the

experience of sexual assault.

If his comments are found to give rise to an apprehension of gender and/or cultural bias, this should be considered sufficient grounds for a finding of misbehavior and/or a questioning of his ability to perform his duties appropriately.

We would also urge this Inquiry to make a recommendation to the Commissioner of the NWT to establish an Inquiry into the matter of sentencing for sexual offences in the NWT. We feel this matter is closely connected to those considered in this Inquiry and deserving of a separate, careful study, to ensure that present practices are in keeping with standards elsewhere and with the perceptions of aboriginal women as to the seriousness of these offences.

All of which is respectfully submitted.

L. Fay Williams
Interim President

June 18, 1990

NOTES

1. R. v. Ikalowjuak, (1980), 27 A.R. 492.

2. Determination of State of New York Commission on Judicial Conduct, Oct. 25, 1984, p.5.

3. Report of the Judicial Council convened to investigate complaints concerning the conduct of His Honour Raymond A. Bartlett, Province of Nova Scotia, January 8, 1987, p. 8.

4. Ibid., p. 20.

5. Boyle, C., and Worth Rowley , S., "Sexual Assault and Family Violence: Reflections on Bias," in Martin, S., and Mahoney, K., eds., Equality and Judicial Neutrality (Carswell, 1987), pp. 312 - 325 at pp. 313 - 314.

6. Ibid., p. 314 .

7. See Wikler, N., "Water on Stone: A perspective on the Movement to Eliminate Gender Bias in the Courts", (1989), Court Review, Vol. 26, No. 3, pp. 6-13, at p. 10.

8. Madam Justice B. Wilson, "Will Women Judges Really Make A Difference?", Lecture at Osgoode Hall, York University, Feb. 8, 1990, at p. 13.

9. Marshall, P., "Sexual Assault, the Charter and Sentencing Reform", Criminal Reports, Vol. 63, Sept. 1988, pp. 216 - 235, at p. 216.

10. Bond, A., "Gender Equality in the Judiciary: a Survey of British Columbia Decisions" in Gender Equality in the Courts, Manitoba Association of Women and the Law, Nov. 1988, Appendix A, pp. 4, 10, 16.

11. Ibid., p. 10.

12. Marshall, P., supra., note 7, p. 221.

13. Ellis, M.,"An Analysis of Sexual Offence Sentencing in the B.C. Court of Appeal", paper presented to the Western Workshop, June 1989, p. 8.

14. Marshall, P., supra., note 7, p. 223.

15. Symons, M., Memorandum, May 24, 1990.

16. Marshall, P., supra., note 7, p. 220..

17. Ellis, M., supra., note 11, p. 5.

18. Finkelhor, D., Child Sexual Abuse: New Theory and Research MacMillan, New York, 1984, p. 64.

19. Nahanee, T., Criminal Law: Judicial Discretion, Disparity in Sentencing and Cultural Considerations in Major Sexual Assault Cases in the Northwest Territories Involving Inuit, Draft paper, May 1990, at p. 1.

20. Mr.Justice H. Kierulf, "Linguistic and Cultural Differences Encountered by Indigenous People in Court", (1990), 2 C.N.L.R. 1.

21. Turpel, M.E. "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", (1989-90) Canadian Human Rights Yearbook 4, at p.24.

22. Report of the Nova Scotia Royal Commission into the Prosecution of Donald Marshall, Jr., December 1989, at p. 11.

23. Ibid., p. 29 - 30.

N.W.T. Advisory Council
on the
Status of Women

NEWS RELEASE

MORE CALLS FOR JUDGE'S DISMISSAL

Yellowknife , NWT and Ottawa, Ontario (December 22, 1989) Three major NWT women's groups have joined together to call for the removal of Judge Michel Bourassa from the Territorial Court bench. The NWT Native Women's Association, Pauktuutit and the NWT Advisory Council on the Status of Women were reacting to public comments made by the NWT Minister of Justice yesterday.

"We understand Mr. Ballantyne's difficult position and his concern about not wishing to pre-judge the investigations underway by the Judicial Council and the Chief Judge of the Territorial Court. However, we want to go on record stating very clearly that, if the investigations indicate that Judge Bourassa's opinions and judgements are detrimental to women, he must be dismissed. The women and children of the NWT deserve better, and we will not accept anything less than true justice in the territorial courts." says Mary Sillett, President of Pauktuutit, the Inuit Women's Association of Canada.

Her sentiments are echoed by Barbara Jo May, Vice-President of the NWT Advisory Council on the Status of Women, and Alice Hill, Executive Director of the NWT Native Women's Association. "We do not feel that a man who has shown racist and sexist attitudes belongs on the bench. His attitudes towards women, and aboriginal women in particular, are not acceptable."

% Women's Secretariat, P.O. Box 1320, Yellowknife, N.W.T. X1A 2L9 Telephone (403) 920-6177

The three groups are also concerned that this particular incident not be treated in isolation. There is a deeply ingrained bias in the judicial system, and in society as a whole, which needs to be recognized and corrected. This incident shows dramatically the need for the education of judges about the realities of sexual violence and wife assault, and the need for the appointment of more women as judges.

The three organizations are encouraging people to express their concerns in writing to Michael Ballantyne as Minister of Justice, to Chief Judge Halifax and to the NWT Judicial Council.

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APPENDIX 2

evidence filed by the respondent is helpful in determining what to do now. In our opinion, the appeal must succeed and the sentence must be increased. As the respondent has served part of the sentence that was imposed on him by the trial judge, and in recognition of the additional hardship to him of the increase in his sentence and returning him to prison, we think the ends of justice are best served if at this time we impose a maximum reformatory sentence of two years less one day.

In the result, then, the appeal is allowed, and the sentence of imprisonment of 90 days, to be served intermittently, is increased to two years less one day. The period and conditions of probation stand. There will be an order pursuant to s. 98(1) of the Criminal Code in the terms of that section.

Appeal allowed; sentence varied accordingly.

SEXUAL ASSAULT, THE CHARTER AND SENTENCING REFORM

by

PATRICIA MARSHALL*

Since its inception in 1984, the Metro Action Committee on Public Violence Against Women and Children ("METRAC") has engaged in extensive research and advocacy work in the area of sexual assault – focussing especially on judicial and societal understanding of the crime and the treatment of sexual assault survivors in the criminal justice system. In the face of responses varying from polite scepticism to outright disbelief, METRAC has developed a database consisting of several hundred sexual assault sentencing reports.

Analysis of METRAC's data reveals that judges' understanding of the experience of sexual assault, as evidenced by their comments to sentencing, only infrequently coincides with the reality reported by sexual assault survivors. We have, therefore, grave concerns about present sentencing practices in sexual assault cases. We are concerned

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*Executive Director, Metro Action Committee on Public Violence Against Women and Children. The author has appreciated the research assistance of Kate Andrew and Vesna Josifovski, and the support of the board of directors and staff of METRAC in the preparation of this paper.

specifically about the Charter implications of these practices and about any sentencing reform initiatives that do not recognize and address the faulty assumptions made about the nature of the crime of sexual assault and other crimes of violence against women and children.

The equality provisions of the Canadian Charter of Rights and Freedoms – and in particular the explicit guarantee provided in s. 15 – are critically important to our work. Section 15 of the Charter of Rights and Freedoms reads:

> 15. (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination . . .

With these words, s. 15 provides us with a simple measure with which to approach the criminal justice system: "Do women and children receive equal benefit and equal protection of the law without discrimination?"

Sexual Assault Survivors and the Criminal Justice System

Of all the major crimes, sexual assault is probably the most under-reported. The majority of sexual assault survivors never report the assault. In the largest victimization survey in our country,[1] those who did not report sexual assault were asked why. Mistrust of the criminal justice system was the most frequently given response: women simply did not believe they would receive equal benefit and protection of the law. Conservative estimates tell us that one in four women in Canada will be sexually assaulted at some time in her life.[2] These women cannot be said to be receiving the benefits conferred by s. 15.

For those who do report and go through the stressful court system, those women who, often reluctantly and for the benefit and safety of other women, agree to testify in court, the benefits may still be elusive. Courts are not sufficiently attuned to the reality of women or the emotional effects suffered by the victims of sexual assault.

Our files are filled with poignant examples of women who are twice punished. They have lived through the violation of a sexual assault and then the violation of the courtroom experience, where often

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[1]Solicitor General of Canada, Canadian Victimization Survey, Reported and Unreported Crimes (1984), p. 3.

[2]Julie Brickman and John Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population" (1985), 7 Int. J. of Women's Studies 195

they – the victims – are put on trial. These women undergo the humiliating and painful process of relating the story of the assault to a room full of strangers, of reliving the trauma, their responses directed by questions over which they have no control. Their reward often is to see their assaulter acquitted.

SEXUAL ASSAULT ACQUITTALS

Canadians often do not see rape as rape. In a recent research project, acquaintance rape scenarios that fell within the legal definition of rape were actually named as "rape" by only 48 per cent of research participants.[3] Not until the level of violence reached the point where the assaulter actually cut the victim with a knife were the scenes recognized as rape by everyone. The implications for the courtroom are sobering. There will be an acquittal if one of the jury, or the judge, is one of the 52 per cent who is not convinced "beyond a reasonable doubt" that a rape has taken place.

In some cases, the evidence of damage is so clear that it is difficult to understand the acquittal. In one case, police testified that the victim had been bound in a fetal position, mumbling incoherently. The court, however, seemed so bedazzled by the social standing of the middle-class assaulter, and evidenced so much confusion about the difference between rape and "good sex", that the accused was acquitted. By no stretch of the imagination can the victim be said to have received equal benefit of the law. Her devastation continues.

In another instance, the accused was a doctor who impressed the judge with his unhesitating recounting of dates and details of the examinations where alleged assaults had occurred. The victim, understandably, spoke hesitatingly about the dates and the details as she recalled them. The judge had apparently no comprehension of the victim's trauma in reliving the details – or the implications of this. Her presentation of her testimony was less than polished. The judge acquitted.

Although the requirement of recent complaint has finally been removed from the law,[4] a stepfather alleged to have committed over 200 sexual acts with his 15-year-old stepdaughter was acquitted because a judge concluded that the case came down to the credibility of a 15-year-old who did not tell anyone until two years after the al-

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[3]Barbara Dominic and James V.P. Check, "The Impact of Highly Aggressive Cues on Perceptions of Stranger and Acquaintance Rape Scenarios" (1986), 27 Can. Psychology, No. 2.

[4]Criminal Code, R.S.C. 1970, c. C-34, s. 246.5 [en. 1980-81-82-83, c. 125, s. 19].

leged abuse began. "Such a long silence . . . leads me to have grave doubts about her credibility."[3]

When it is his word against hers as to whether there was consent, the man in the case is often seen as more credible because he is in the superior position, deriving authority and status from his age, employment or other factors. Research on "genderlectics" tells us that "male" speech patterns guarantee greater credibility.

Hangover effects from the old law are still with us. Prior to 1983, the law reflected the prevalent habitual disbelief of women in the requirement for corroboration of the offence and recent complaint. Women were treated in the courtroom as "fair game", to be examined on any aspect of their past sexual history; if found "unchaste", they were punished by being characterized as untruthful. Some women were considered "rapeable". The notion that consent, once given, could never be withdrawn was supported by the spousal immunity clause; the ripple effect of this was to cover with "immunity" those assailants who had any relationship, however slight, with the woman they assaulted.

The acquittal of assailants may well be increasing. One contributing factor here is that defence counsel have more preparation time than have our overextended Crown attorneys. Recently the Attorney General of Ontario, Ian Scott, reported that Crown attorneys can often afford no more than a single, 15-minute pre-trial interview. That is not enough time to gather enough information to mount an adequate prosecution. Even if this does not lead to an acquittal, the impact on sentencing may be considerable.

Sexual Assault Sentencing

In cases where an assaulter has been found guilty, clear evidence that a crime took place is no guarantee that the judge understood either the nature of the crime or its impact on the victim.

Research on sentencing necessarily deals only with the "sure" cases, those which have not been withdrawn or dismissed as they filter through the stages of the criminal justice system. Nonetheless, our research at METRAC on judges' comments when sentencing, we have found considerable discrepancy between judicial understanding of sexual assault and women's experience of assault. While this analysis is neither comprehensive nor conclusive, we hope it will provide challenges to current thinking and practices.

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[3] *R. v. F.B.*, Ont. Dist. Ct., Norfolk, 9th April 1987 (not yet reported).

The seemingly high tolerance of violence in sexual assault is not seen in the treatment of other violent crimes. In case after case, the inherent violence involved in sexual violation is not recognized. The absence of overt physical force or weapons is often seen to imply lack of coercion. Only in a minority of sexual assaults is physical coercion, or a weapon, used to overpower the victim. Yet gradation of sexual assault offences in the Criminal Code reinforces the notion that sexual assault is not of itself violent; violence is seen as an added factor.

In the majority of sexual assaults, the assailant uses verbal threats, a position of authority, or the fear evoked by his size and strength to establish power over the victim. In the following cases, the judges have not understood this basic fact about sexual assault and have used "absence of violence" to mitigate the sentence (see table, "Judicial Comments: Violence", p. 226).

In a research study prepared for the Canadian Sentencing Commission, Mitigating and Aggravating Factors in Sentencing Appeals in Alberta and Quebec from 1980 to 1985, made available to METRAC in draft form, S.H. Benzvy-Miller found that "no violence" was very frequently used as a mitigating factor in sexual assault cases in the Quebec Court of Appeal. In Alberta, other factors frequently mentioned to mitigate include family background, good record of employment, remorse, use of drugs and alcohol, and rehabilitation of the offender; these raise a number of problems.

As an example, although rehabilitation of the offender is the ideal result for society, the mitigating factors currently cited will not, of themselves, bring about rehabilitation, any more than they prevented the initial assault. There is a lamentable lack of – and pressing need for – research evaluating rehabilitation programs for sexual offenders to identify those which are truly effective. Chances of rehabilitation cannot be properly assessed for sentencing until such information is available to the courts.

Some judges cover the violence of the act with euphemisms which disguise the severity of the violation:

A fire chief lured a 14-year-old girl into a back room at this fire station, showed her a pornographic movie, then unzipped his trousers, letting her go only when she started to cry; the judge described this as a "misstep", meriting only a year's probation: *R. v. Morden*, Ont. Prov. Ct., Orangeville, 23rd October 1987 (not yet reported).

Sexual assaults on a man's young daughters were described by

another judge as "the conduct could have been an exaggerated paramedical examination by the father": *R. v. G.*, Ont. Dist. Ct., Guelph, 26th November 1985 (not yet reported).

A farmer who sexually assaulted six boys he had hired for summer farm work was described as being "a man who gets caught up in the spirit of boyish horseplay": *R. v. Murchie*, Ont. Dist. Ct., Welland, 7th April 1981 (unreported).

A judge talked of an assailant's "misplaced sexuality": *R. v. Kennedy*, Ont. Dist. Ct., Goderich, 18th July 1986 (not yet reported).

A sexually-abusing social worker was given a suspended sentence, with the tolerant judicial comment that "to err is human"; the judge also said the charge was "completely out of character", not knowing that the same accused was in court on two similar charges that week: *R. v. Webber*, Ont. Dist. Ct., Toronto, 26th March 1987 (not yet reported).

Blindness to violence is not, of course, limited to judges. It also contributes to current problems with parole and early release of assaulters. One parole board member, a prison chaplain, named the sexual mutilation and murder of a woman an "interrupted property offence". The prisoner was then released, and soon murdered a halfway house worker in Ottawa.

Judges often profoundly underestimate the impact of this assault. Formal research, as well as our own experience in talking to sexual assault survivors, have confirmed that the psychological consequences are usually severe and long-lasting (see table, "Effects of Crime on Women", p. 227).

The French word for rape, "viol", shares a common Latin root with the English terms "violence" and "violation". Internationally-renowned police psychologist Morton Bard names rape "a trampling of the mind, body and soul", "the ultimate violation", and locates it just before homicide – at the end of the violation continuum. That this is inconsistent with judicial understanding of victim impact is reflected in the comments of the following cases (see table, "Judicial Comments: Victim Impact", p. 228).

Sentencing can often rest on a paradigm of what a "real" rape is: the "blameless" victim is a 15-year-old virgin or a frail 85-year-old; the accused is an unemployed stranger in a Balaclava. The extent to which victim or accused deviate from this paradigm seems to determine the level of trivialization or excusing of the crime.

The assailant's responsibility for his own actions is often diminished by counsel and judge alike. In many cases, the judge's concern for the accused overshadows any expressions of outrage regarding the act. In cases of middle-class offenders, disproportionate weight can be given to mitigating factors such as employment, monetary loss, "marital problems", a good Grade XII report card, club membership and citizenry. These factors can be used to demonstrate that this assault was a single instance and "out of character".

No such conclusion is supported by the research. Men who rape are to be found in all social, educational and professional categories. Indeed, METRAC's work around sexual abuse by health professionals constantly reminds us of this regrettable fact.

Comments to sentence also have considerable impact not only on the sexual assault survivor but also on those considering reporting other cases. In a recent Ontario decision, *R. v. J.F.D.*, Ont. Dist. Ct., Toronto, 4th November 1985 (not yet reported), reversed 25 O.A.C. 78 (C.A.), where the assault included such aggravating factors as planning, abduction at gunpoint, threat of death and forced sexual intercourse at gunpoint, the judge agreed that "the offence was a serious one, but it was not accompanied by many of the unpleasant features which often surround such an offence". The sentence was then reduced from 2 1/2 years to two years less a day. Such comments and sentencing leave the impression that other cases of sexual assault, where few or none of these factors are present, will not be worth taking to court.

We welcome the effort made by the Canadian Sentencing Commission in Sentencing Reform: A Canadian Approach (1987), to address the unwarranted disparity in sentencing by recommending sentencing guidelines. Yet, although the commission did a great deal of excellent work, its recommendations are based on the assumption that the sentencing rationale selected will be based on a clear understanding of the crimes involved. That is at odds with our findings.

AGGRAVATING AND MITIGATING FACTORS

In addition to proposing sentencing guidelines, the commission suggested aggravating and mitigating factors to be considered as primary grounds to justify departure from the guidelines. The following discussion illustrates the kind of consideration that needs to be applied in an examination of the recommended factors and their use.

We see "evidence that the offender was under duress" used as a mitigating factor to support an insupportable mythology regarding

rape. The naming of marital dysfunction as a source of "duress" is a particularly objectionable form of woman-blaming (see table, "Judicial Comments: Marital Dysfunction", pp. 230-33).

"Absence of previous convictions" must obviously be considered as a mitigating factor, but two factors should be borne in mind here: first, that sexual assault is widely under-reported; and second, that both acquittal and plea-bargaining (down from sexual assault to assault) are frequent occurrences.

"Evidence of provocation by the victim" may be problematic in its use in sexual assault sentencing. Its misuse can criminalize "unwise" behaviour, such as walking home at night or having a drink with friends. Whether provocation is found in the victim's profession (such as the table dancer who was held responsible for promoting lust) or in the "cute" behaviour of a child held to be seductive and thus blameworthy, an excuse for rape is to be found in the dress, location or work of the victim. Indeed, almost any action of the victim can be thus construed. In a recent Ontario decision, *R. v. Stefanidis*, Ont. Dist. Ct., Toronto, 4th March 1988 (not yet reported), the judge commented: "[The victim] did not distinguish herself by relieving herself on the parking lot, and I supposed by doing that she may have communicated some further message to the young men involved."

Caution should be exercised about the aggravating factor "manifestation of excessive cruelty towards the victim". The nature of sexual assault is often misunderstood, and the judicial criteria for violence presently used in sentencing are not always consistent with women's experience of violence and cruelty.

In cases involving money, breach of trust is easily recognized as an aggravating factor, but the METRAC study shows a significant number of sexual assault cases where the breach of trust was not explicitly recognized in sentencing (see table, "Judicial Comments: Breach of Trust", pp. 234-35).

We would therefore say that the proposed guidelines will be effectively and equitably used only if they are accompanied by education programs for all the judges.

An Informed Judiciary

The existence and extent of gender bias in the courts has already been established in various jurisdictions. Both the New York Task Force on Women and the Courts, Office of Court Administration, report of 31st March 1986, and the New Jersey Supreme Court

Task Force Summary Report, 1983, 21st November 1983, New Jersey Judicial College, included strong representation from trial and appellate judges, as well as other senior officials of the criminal justice system. Both task forces recognized that, if women are to receive equal benefit of the law, gender bias must be eradicated.

The New York Task Force report confronts the issue in saying:

> Calls for complacency in identifying gender bias in New York's courts and for sole reliance on the passage of time for its amelioration misapprehend the nature and consequences of gender bias in our society. The courts have a special obligation to reject – not reflect – society's irrational prejudices.

Specific recommendations of the task force, such as those suggested below for court administration, recognize that "certain legislative and prosecutorial measures can offer a more appropriate response to the unique trauma rape victims suffer". For example, there is a welcome recommendation that educational steps be taken "to assure that judges are familiar with various aspects of sexual assault":

> 1. the substantial current data about the nature of the crime of rape, the psychology of offenders, the prevalence and seriousness of acquaintance rape and the long-term psychic injury to rape victims;
>
> 2. the difference between vigorous cross-examination that protects the defendant's rights and questioning that includes improper sex stereotyping and harassment of the victim;
>
> 3. the appropriate utilization of victim-impact statements.

The report recommends similar training for Assistant District Attorneys and police officers, while urging bar associations and law schools to ensure that community education programs and criminal justice programs contain similar accurate information.

METRAC's experience in assisting the Metropolitan Toronto Police Force to establish training programs for their officers has shown that both understanding of the nature of sexual assault and also response to assault survivors improved markedly. We therefore support the establishment of such programs for the judiciary.

We welcome and have supported the development of the Canadian Judicial Centre and hope to see programs implemented like those developed by the United States National Judicial Education Program to Promote Equality Between Men and Women in the Courts.

The nature of judicial appointments will be a key factor in ensuring an informed judiciary. Composition of the bench across Canada, and even criteria for judicial appointments recently proposed by

the Canadian Bar Association – generosity, patience, sympathy, charity, good work habits, high moral character, experience in the law, bilingualism, intellectual and judgmental ability and good health – reflect little sense of being influenced by s. 15. One priority criterion must unquestionably be "demonstrated understanding of equality issues".

The bar association developed their limited criteria even after the Parliamentary Committee on Equality Rights had made its recommendation that:

> . . . judicial appointments be made in a manner that reflects the composition of Canadian society, in keeping with the objectives of Section 15 of the *Charter* and that criteria for the selection of judges take into account the policy role they perform in interpreting and applying the *Charter*.

The Charter and Sentencing Reform

If changes to sentencing procedures are imposed on an essentially-unchanged structure of gender bias and judicial misunderstanding, their success will be minimal, and Canada will be left with inadequate reforms in sentencing practice. Due attention must be paid to the assumptions underlying current sentencing practice.

The Canadian Sentencing Commission has recommended the establishment of a permanent sentencing commission, together with a judicial advisory council, to help to continue and co-ordinate the much-needed overhaul of sentencing practices. A demonstrated understanding of equality issues must be a prerequisite for the appointment of commissioners. In addition, educational programs need to be put in place for each new recommended body.

Setting the promise of the Charter against the reality of women's experience in the courts makes it quite clear exactly how vulnerable and fragile are women's rights to justice at the hands of the law. Our Charter's promise of equal benefit and protection of the law was not lightly agreed upon, and s. 15 was delayed three years in its implementation from 1982 until 1985. The benefits of that delay, and of the new sexual assault law, are not easy to determine.

Doris Anderson, writing of a recent case, reflects so clearly the experience documented in METRAC's study: "Because no weapon had been used, the judge decided there had been no lasting harm. The man got two years less a day. [His fifteen-year-old victim] got a life sentence."

Achieving the equal treatment guaranteed under s. 15 of the Charter will be no easy matter. The growing recognition of the need to acknowledge equality issues in sentencing reform is a promising first step.

JUDICIAL COMMENTS: VIOLENCE

CASE/SENTENCE	FACTS	COMMENTS
: v. A. (1986), 68 .R. 84 (N.W.T. C.A.): wo years less a day, lus one year's proba- on	Raped step-daughter three times over two-month period.	"no violence" (p. 85).
: v. *Aubin*, Ont. Dist. :t., 12th November 985 (not yet report- d): uspended sentence	Used pornography. Fondled young girl's genital area and breast area. Friend of girl's father.	"no violence".
: v. B., N.W.T. S.C., th April 1984 (un- eported): hree months' im- risonment plus two ears' probation	Indecently assaulted 17-year-old step-daughter.	"no violence was used . . . The judge also noted the unique problems caused by difference between native culture and 'white' culture."
: v. C., Ont. Dist. Ct., th February 1981 unreported): wo years less a day or four sexual offences	Indecent assault, gross indecency against three young girls and forced sexual assault against foster daughter "once a week".	"None of the acts involved violence or the use of violence except for one child on one occasion who refused to submit and who was pushed down." "Non-violent and non-aggressive pedophile".
: v. C. (1983), 1 O.A.C. 139 (C.A.): en years' imprison- ent	Seven counts of sexual abuse against six young girls, including daughter, for period of time.	"The offence in this case did not involve violence or threat of violence . . ." (p. 141).
: v. C. (1982), 69 C.C.C. (2d) 81 (Ont. C.A.): Suspended sentence plus two years' proba- ion	Forced sexual intercourse 12 or 13 times against 14-year-old daughter.	"no allegation he had used physical force or violence" (p. 82).
R. v. D., Ont. Co. Ct., 29th June 1984 (un- reported): 15 months' imprison- ment	Indecent assault and sexual assault. "Two series of ongoing sexual misconduct with his daughters [9 and 12 years old]."	"There was no violence."

CASE/SENTENCE	FACTS	COMMENTS
R. v. DeGenova, [1985] B.C.W.L.D. 3402 (C.A.): One year's imprisonment plus two years' probation	Sexually assaulted two 4-year-old girls.	". . . nor had the accused threatened or used violence in the circumstance".
R. v. D., Ont. Dist. Ct., 9th September 1986 (not yet reported): Three years' imprisonment	Forced sexual intercourse and indecent assault against daughter 500 times, attempted forced sexual intercourse against niece.	No "physical coercion".
R. v. D., [1984] B.C.W.L.D. 2495 (C.A.): 18 months' imprisonment plus two years' probation	Two counts of indecent assault against daughter.	"No threats or force were used".

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EFFECTS OF CRIME ON WOMEN

Study of 2000+ women Ages 18-20	*Had Nervous Breakdown*	*Thought Seriously of Suicide*	*Attempted Suicide*
Non-victims	3.3%	6.8%	2.2%
Victims of:			
Attempted Rape	8.9%	29.1%	8.9%
Completed Rape	16.0%	44.0%	19.0%
Attempted Sexual Molestation	5.4%	32.4%	8.1%
Completed Sexual Molestation	1.8%	21.8%	3.6%
Attempted Robbery	0.0%	9.1%	12.1%
Completed Robbery	7.7%	10.8%	3.1%
Aggravated Assault	2.1%	14.9%	4.3%

JUDICIAL COMMENTS: VICTIM IMPACT

CASE/SENTENCE	FACTS	COMMENTS
R. v. Ashbee, Ont. H.C., 10th December 1984 (unreported), varied 8 O.A.C. 341 (C.A.): 90 days' intermittent plus three years' probation; C.A.: one year's imprisonment plus one year's probation	"He took her to a secluded area and raped her (forced sexual intercourse). The complainant struggled a great deal but the accused overpowered her."	". . . no lasting and permanent damage to the complainant".
R. v. Barrera, Ont. H.C., 23rd November 1983 (unreported): Five years and three years (including all charges)	"Panz . . . committed an act of buggery on the complainant, while at the same time . . . Barrera was forcing the complainant to perform acts of fellatio upon him."	". . . no evidence of any permanent injury inflicted upon the complainant [13-year-old]".
R. v. Blazeski, Ont. H.C., 7th October 1983 (not yet reported): 15 months' reformatory	Forced sexual intercourse.	". . . no injury to her person or damage to her clothing".
R. v. Buteau, Ont. Dist. Ct., 9th July 1986 (not yet reported): Four years' imprisonment and five years' firearm prohibition; two years' imprisonment and ten years' firearm prohibition	Sexual assault with a weapon – victim became a prostitute to support Buteau; accused urinated on victim and used plunger on victim's vaginal area.	". . . victim suffered no lasting psychological injury".
R. v. Charrette, Ont. Dist. Ct., 4th June 1980 (unreported): Two years' imprisonment	Forced sexual intercourse with 16-year-old, "not a virgin".	"Although spontaneous, his actions and intentions were fixed, determined and deliberate and, while he threatened her if she did not desist in her screaming, he used no violence toward her to effect his purpose. The injuries caused her were minimal and resulted from forced intercourse in a cramped area by two large persons. Nor has the complainant suffered emotionally from her experience, except momentarily, following the events of that evening, but only then."

R. v. Cronin, Ont. Co. Ct., 21st March 1980 (unreported): Three years' imprisonment plus two years' probation	Forced sexual intercourse against 13-year-old girl.	"No emotional trauma developed because of the incident."
R. v. D., Ont. Dist. Ct., 8th December 1986 (not yet reported): One year's imprisonment	Sexually assaulted stepdaughter and daughter for eight-year period.	"There is no evidence of lasting impact on the children."
R. v. G. (1983), 2 O.A.C. 396 (C.A.): Suspended sentence plus three years' conditional probation	Forced sexual intercourse against oldest daughter; indecently assaulted youngest daughter.	". . . no violence or threats of violence", victims "do not appear . . . to have suffered long-term psychological damage" (p. 397).
R. v. Guitard, Ont. Dist. Ct., 7th January 1980 (unreported): Nine months' imprisonment plus strong recommendation for temporary absence program	Forced sexual intercourse. "Although he once told her to shut up as she screamed, he never threatened her with harm or otherwise physically assaulted her and did not harm her physically in the act of intercourse." The girl (20-year-old non-virgin) passed out in the course of the rape, and when she came to there was a blanket over her.	"There were no threats or use of force. The victim was not hurt in any way and has not suffered any psychological damage."

JUDICIAL COMMENTS: MARITAL DYSFUNCTION

CASE	SENTENCE	VICTIM	OFFENDER	NATURE OF SEXUAL ASSAULT OFFENCE
R. v. Baillie (1985), 7 O.A.C. 340 (C.A.)	90 days' intermittent imprisonment.	Attacked and indecently assaulted woman.	Minor criminal record	"There is also, apparently, the prospect of reconciliation with his wife . . ." (p. 342).
R. v. B., Man. Prov. Ct., C.S.D. 1985-87, s. 92.55, p. 92-18 (not yet reported)	Suspended sentence, two years' probation.	Two daughters.	Illiterate man with no sexual fulfillment	"His wife, an alcoholic, left him with custody of the daughters and two other children . . . He had led a very lonely and reclusive life with no sexual fulfillment."
R. v. C., Ont. Dist. Ct., Algoma, 17th May 1982 (unreported)	90 days' imprisonment, one year's probation, 150 hours' community service.	Adopted daughter.	Teacher	"Offences are linked to marital problems, including sexual dysfunction."
R. v. Ferguson, Ont. H.C., 22nd September 1982 (unreported)	2 1/2 years' imprisonment. Priors: common assault.	"Date rape"; choked and raped.	"Stable family background"; "self supporting since the age of 18."	"After the incident he formed a relationship with a woman he has now married."

Case	Sentence	Victim	Offender	Nature of Sexual Assault Offence
R. v. Ferraro, Ont. H.C., 28th November 1982 (unreported)	–	Raped woman.	–	"He has had some domestic difficulties but apparently his wife is prepared to resume co-habitation with him."
R. v. G., Ont. Dist. Ct., Guelph, 26th November 1985 (not yet reported)	Suspended sentence plus three years' probation	Three daughters assaulted and indecently assaulted.	Father	". . . why he did not have the mother perform this duty".
R. v. Guthrie, (1985), 20 C.C.C. (3d) 73, 8 O.A.C. 277 (C.A.)	Four years' imprisonment	She agreed to sleep on his couch, they met in his apartment lobby.	"Normal stable upbringing" (p. 86).	"At the time of sentencing, he was living with a 22 year old woman whom he has now married. They have a child." (p. 86).
R. v. H., Ont. Dist. Ct., Algoma, 29th September 1981 (unreported)	Suspended sentence, two years' probation.	15-year-old daughter.	–	"There is an indication that the mother of the victim has a drinking problem and there were a series of separations."

CASE	SENTENCE	VICTIM	OFFENDER	NATURE OF SEXUAL ASSAULT OFFENCE
R. v. Mathews, Ont. Dist. Ct., Toronto, 5th September 1986 (not yet reported)	90 days' intermittent imprisonment plus one year's probation plus 90 hours' community service.	Prostitute.	–	"Agreed to a sexual act for a price. The accused did not have as much money as the victim demanded, so he forced himself on her. The accused lost his job as a result of the criminal proceeding and suffered considerable embarrassment."
R. v. McArthur, Ont. H.C., Barrie, 30th May 1983 (not yet reported)	Two years less a day plus two years' probation.	13-year-old.	–	"He was having marital difficulties . . ."
R. v. P. (1985), 7 O.A.C. 348 (C.A.)	Nine months' imprisonment plus three years' probation.	14-year-old daughter.	Alcoholic, Grade IX education	"The respondent had a partner die and had lost his electrical business. His wife had been involved in a serious accident and suffered a ruptured liver, which required hospitalization." (pp. 349-50).

Case	Sentence	Victim	Offender	Nature of Sexual Assault Offence
R. v. R.K.B., Man. Prov. Ct., 28th June 1985 (unreported)	Two years' probation.	Two daughters.	Illiterate man	"The offences arose out of sexual desires that were unfulfilled by reason of the accused's separation from his wife and did not go beyond fondling."
R. v. Terreira, Ont. Dist. Ct., Toronto, 15th November 1984 (unreported)	Two years less a day plus three years' probation.	Prostitute.	"Better than average record of employment, has a wife who has remained loyal to him, and has a baby."	"The court takes into consideration the fact that, whether it was for the accused's benefit or the complainant's, he used a condom to give some protection, and that there were no cuts and scratches."
R. v. W., Ont. Dist. Ct., Toronto, 2nd October 1985 (not yet reported)	20 months' imprisonment.	15-year-old common law daughter.	Common law father, alcoholic	"The cases in the family situation often have a pattern that is repeated, in this case of a sexual deterioration or a deterioration of the sexual relationship of the parents, and the indulgence in alcohol, as well as the inexplicable transferring of sexual attention to a daughter or step-daughter."

JUDICIAL COMMENTS: BREACH OF TRUST

CASE	SENTENCE	FACTS	COMMENTARY
R. v. B., Ont. Co. Ct., Toronto, 11th January 1982 (unreported)	Two years' imprisonment less a day	Gross indecency against daughter and stepdaughter for five months; photographed sexual abuse.	"No propensity to this type of behaviour"; "public abhorrence of the exploitation of children"; no mention of breach of trust.
R. v. C., Ont. Dist. Ct., Kane D.C.J., Toronto, 3rd July 1986 (not yet reported)	Suspended sentence, two years' probation	Gross indecency against 6-year-old niece for several weeks.	Pleaded guilty and remorseful; victim is "withdrawn", "distrustful of males", and has "additional difficulties"; no mention of breach of trust.
R. v. P.D., Ont. Dist. Ct., Wren D.C.J., Toronto, 9th September 1986 (not yet reported)	Three years' imprisonment	Forced sexual intercourse against daughter for nine-year period; indecently assaulted daughter for 12-year period; indecently assaulted and attempted forced sexual intercourse against 14-year-old niece; over 500 acts of forced sexual intercourse against daughter.	No "physical coercion"; "the victims experienced grief, distress, embarassment, shame and anger, which have persisted to this day"; no mention of breach of trust.

Case	Sentence	Facts	Commentary
R. v. E., Ont. Co. Ct., Elgin, 17th March 1981 (unreported)	Suspended sentence, three years' probation	Photographed child pornography; accused, mother and stepfather, photographed child when she was 10 to 12 years of age in "sexually suggestive poses".	"It is not necessary to separate the child from her mother and stepfather"; no mention of breach of trust.
R. v. W., Ont. Dist. Ct., Guelph, 30th June 1986 (not yet reported)	Nine months' imprisonment	Forced sexual intercourse against 14-year-old stepdaughter three times.	No evidence of "lasting impact on the victim"; "to take advantage in such a gross fashion and to abuse the trust and power . . . over young children is something which society cannot tolerate"; "The accused is respected in the community."